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Supreme Court, U.S.
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No. 99-1774

In The

Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC. AND DILLARD'S NEVADA, INC.,

Petitioners,

v.

DELORIS BECKWITH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a punitive damages verdict rendered in a bifurcated proceeding and subject to a statutory cap may be upheld on state grounds and under *BMW of North America v. Gore*, 517 U.S. 559 (1996), when the corporate defendant never argued below that the punitive damage award was "grossly excessive" in violation of the Due Process Clause of the Fourteenth Amendment and *BMW's* three guideposts, but instead complained on the sole ground that it was improper for the jury to consider the company's nationwide net worth as one of many factors when determining the amount of punitive damages to award.

PARTIES TO THE PROCEEDING

The Petition incorrectly spells Respondent's name. The correct spelling of Respondent's name is Deloris Beckwith. Additionally, it should be noted that although the names Dillard Department Stores, Inc. and Dillard's Nevada, Inc. appear in the caption of the Nevada Supreme Court's opinion reported at 989 P.2d 882, both parties were actually removed from the caption in the lower court proceedings and replaced with Dillard's, Inc. based on: (i) filings with the Securities and Exchange Commission reflecting that Dillard Department Stores, Inc. had changed its name to Dillard's, Inc., and (ii) representations by Petitioners that Dillard's Nevada, Inc. was only a stock holding company that owned no stores. 9/29/97 Tr. 10-12; Dillard Answer to Interrogatory No. 14 dated 4/3/97.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Deloris Beckwith respectfully requests that the Court deny the Petition for a Writ of Certiorari filed by Petitioners Dillard Department Stores, Inc. and Dillard's Nevada, Inc. (collectively "Dillard") as it fails to present a question worthy of review.

STATEMENT OF THE CASE

A. Introduction

Less than three months after this Court denied a petition for a writ of certiorari in *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind.App. 1999), *cert. denied*, 120 S.Ct. 1424 (March 20, 2000), Dillard, now represented by the same counsel who represented Ford, asks this Court to review one of the questions presented in Ford's unsuccessful petition: whether consideration of a corporate defendant's nationwide net worth is proper when determining the propriety of a punitive damages award. Lest there is any doubt that the questions presented in both petitions are virtually identical, the Court need look no further than Dillard's own statement to the Nevada Supreme Court that "Ford Motor Company saw fit to file in the Supreme Court of the United States a Petition for a Writ of Certiorari on *exactly the same grounds* as Dillard's discusses in its Motion for Stay." Respondent's Appendix, 7a (emphasis added).[1] Dillard made the foregoing statement when asking the Nevada Supreme Court to stay the

[1] References to Petitioner's Appendix and Respondent's Appendix are cited herein as "App. ___" and "Resp. App. ___," respectively. References to Dillard's petition are cited herein as

remittitur in this action while it sought a writ of certiorari from this Court based on constitutional requirements purportedly enunciated in *BMW of North America v. Gore*, 517 U.S. 559 (1996). Resp. App., 5a-9a. The identity of the questions presented in the petitions is further evidenced by the facts that (i) Ford relied on the Nevada Supreme Court's opinion in its unsuccessful petition to this Court, *see* Resp. App. 7a, and, more significantly, (ii) Dillard's petition is comprised predominantly of near identical chunks of argument transplanted from Ford's petition. *See, e.g.*, Pet. 2-3, 9-12, 15-23. Apparently, Dillard and its new counsel believe that one size fits all.

Although the denial of certiorari does not constitute a decision on the merits, Beckwith respectfully submits that the issue here is even less worthy of this Court's review than that presented in *Ford*. While Dillard repeatedly chastises the Nevada Supreme Court for the latter's alleged failure to comply with the constitutional analysis mandated by *BMW*, the inevitable truth is that Dillard *never* argued in its postverdict motions, its briefs before the Nevada Supreme Court, or its petition for rehearing that the punitive damage award was "grossly excessive" under the Due Process Clause of Fourteenth Amendment – the issue addressed in *BMW*. 517 U.S. at 562. Indeed, at no time did Dillard ever make any reference to "due process," "the Fourteenth Amendment," or even the "Federal Constitution." Nor did Dillard ever present the

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"Pet. ___". References to the record below are cited herein as "(Date) Tr. ___," and cites to "AA" or "RA" refer, respectively, to Appellants' or Respondent's Appendix submitted on appeal to the Nevada Supreme Court.

argument that the punitive damage award was excessive in light of the *BMW* guideposts.

While Dillard made scant references to *BMW* in its briefs before the Nevada Supreme Court, though not its postverdict motions before the trial court or its petition for rehearing before the Nevada Supreme Court, it did so for the lone proposition that *BMW* precluded the trier of fact from considering a defendant's net worth when determining a punitive damage award. These oblique citations did not, however, properly present the federal claim that Dillard belatedly accuses the Nevada Supreme Court of "abandoning." *Cf. Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). Accordingly, Dillard's disingenuous assault on the Nevada Supreme Court is a red herring that this Court may disregard. *Id.*

To the extent Dillard raised the "wealth" issue in isolation, the Nevada Supreme Court squarely addressed it. As will be set forth in more detail below, *BMW* never held that using wealth as one factor among many when determining a punitive damages award violates the Constitution. Nor did *BMW* hold that its three guideposts were meant to be exclusive of state common law factors used to evaluate excessiveness. There is no irreconcilable conflict in the lower courts on this issue. Dillard's petition should be denied.

B. Factual Background

Unlike *BMW*, which involved purely economic injury based on an automobile manufacturer's failure to disclose that the plaintiff's vehicle had been repainted prior to being sold as new, the instant matter involves the retaliatory discharge of a 25-year employee who was injured on

the job and merely sought to exercise her rights under Nevada's workers' compensation laws.

Deloris Beckwith was an exemplary employee of Dillard Department Stores and its corporate predecessors for twenty-five years. App. 1a-2a. While performing her duties, she suffered an industrial injury that was verified by two separate Dillard's physicians. *Id.* at 2a. Despite the physicians' diagnosis, and in direct violation of their recommended course of treatment, Dillard demanded that Beckwith return to work. *Id.* When Beckwith declined to do so, Dillard embarked on a campaign of harassment designed to get rid of her. First, Dillard replaced Beckwith as the Area Sales Manager of the Home Department, a position she had held for the last 19 of her 25 years with Dillard. *Id.* Within days of her return, Beckwith was intentionally humiliated in front of her peers. *Id.* Dillard then demoted Beckwith to an entry level sales clerk position with a corresponding cut in pay and benefits of over 40%. *Id.* When Beckwith complained to her superiors of her treatment and the adverse impact it was having on her health, she was bluntly told that her only other choice was to resign even though other managerial positions, for which she was admittedly qualified, were available. *Id.* at 2a-3a.

Because Beckwith was single and her sole support, she attempted to work in her demoted capacity. *Id.* at 2a. When Beckwith still did not resign, Dillard placed her in a store department known as "Siberia," where she was destined to fail and was known to suffer abuse by teenage clerks who had once been her subordinates. *Id.*; Respondent's Answering Br. 13-14. Faced with such a drastic cut in pay and unable to endure the humiliation caused by the severe reduction in rank, Beckwith finally

quit, one month shy of her twenty-fifth anniversary with Dillard. *Id.* at 2a-3a. Beckwith developed a major depressive disorder for which she consulted a psychiatrist. *Id.* at 3a. Beckwith's depression and its link to her termination were also verified in a subsequent independent medical exam performed by Dillard's retained psychiatrist. Respondent's Answering Br. 16.

Unable to find similar employment, Beckwith filed suit claiming that Dillard constructively discharged her in retaliation for taking time off following her industrial accident. Beckwith also claimed that Dillard intentionally inflicted emotional distress upon her in an effort to force her to quit her job. For its part, Dillard contended that Beckwith was not demoted in retaliation for having availed herself of benefits under the workers' compensation system but, rather, because of a history of poor "performance" and the fact that "she had become a caretaker manager." Respondent's Answering Br. 18.

At trial, Beckwith established a work history devoid of any disciplinary action, with most annual reviews being "very good" or "outstanding." App. 2a; Respondent's Answering Br. 6-8. Indeed, one review authored by Dillard's divisional vice-president described her as "a combination saint and longshoreman." Respondent's Answering Br. 7. In contrast, Beckwith's counsel introduced recent annual reviews of Beckwith's superiors, the store manager and the assistant store manager. Under the same criteria that Beckwith was graded with, both had received scathing reviews for poor performance, yet neither suffered the punishment exacted on Beckwith. *Id.* at 19-20. Dillard's trial counsel all but acknowledged the retaliatory nature of his client's conduct, stating "what [the store manager and assistant store manager] don't

have against them is the fact that they were there." *Id.* at 20.

Beckwith called an expert in the field of retail employment practices who testified that the manner in which Beckwith was constructively discharged had, for all practical purposes, ended her career and ruined any chance of obtaining similar employment. App. 3a; Respondent's Answering Br. 36-37. Beckwith called an economist who testified that she suffered economic losses of $424,028 based on a worklife expectancy of 9.78 years. *Id.* at 9a; Respondent's Answering Br. 17. Dillard never refuted the foregoing testimony with any experts of its own, acknowledging that "[t]hese numbers are all sustainable. There would be no difference. I'm not going to argue the numbers." *Id.*; Respondent's Answering Br. 17.

C. Trial Court Proceedings

1. Beckwith's trial began on August 25, 1997. Prior to closing arguments, the district court instructed the jury on the law. The court instructed that punitive damages were only authorized if the jury found "by clear and convincing evidence, that the defendants have been guilty of oppression, fraud or malice, express or implied, as will be explained." Resp. App. 1a-2a. The court then gave separate instructions that defined the terms "clear and convincing," "oppression," "conscious disregard," and "malice." *Id.* at 2a-3a. The definitions were taken directly from those set forth in NEV. REV. STAT. § 42.001. The court also instructed the jury that any assessment of punitive damages would occur in a subsequent proceeding. *Id.* at 2a. This instruction was based on NEV. REV. STAT. § 42.005(3), which requires that punitive damages may only be assessed in a bifurcated proceeding. Dillard's

counsel *never* objected to any of the foregoing instructions. 9/16/97 Tr. 14-21.

On September 17, 1997, the jury returned a unanimous verdict in Beckwith's favor, finding that Dillard had constructively discharged Beckwith in violation of public policy and intentionally, or with reckless disregard, inflicted emotional distress upon her. The jury awarded Beckwith $424,028 in compensatory damages for her constructive discharge claim and $200,000 in compensatory damages for her emotional distress claim. 2 AA 338-39.[2] The jury also found that Beckwith was entitled to punitive damages. *Id.* at 339.

2. Twelve days later, on September 29, 1997, the district court commenced the punitive damages phase of the trial in compliance with NEV. REV. STAT. § 42.005(3). Before presentations to the jury, the court considered a motion *in limine* filed by Dillard and resolved the punitive damage jury instructions. 9/29/97 Tr. 7-25. Dillard's motion *in limine* expressly conceded that its financial condition was relevant in assessing punitive damages, but argued that this consideration should be limited only to its Nevada stores, not the parent company. The district court judge acknowledged reading all the cases, including *BMW*. *Id.* at 7. Because *BMW* does not, however, address the issue raised in Dillard's motion, the district court decided the issue based on state law grounds,

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[2] Dillard continues to reargue and distort the role of NEV. REV. STAT. § 616C.530 in the lower court proceedings. Pet. 4-5. Because the Nevada Supreme Court thoroughly considered and rejected Dillard's state-based arguments on this issue, their injection into these proceedings is improper. App. 4a-6a; *BMW*, 517 U.S. at 577 ("only state courts may authoritatively construe state statutes").

which permit the consideration of a corporate defendant's net worth. *Id.* (citing *Ainsworth v. Combined Ins. Co.*, 763 P.2d 673 (Nev. 1988)). Dillard's contention that "the district court's ruling was based on Nevada's 'financial annihilation' standard," Pet. 6, is a blatant mischaracterization of the record.

Dillard also distorts the nature of the punitive damage instructions given to the jury. While it is true that the district court denied certain instructions requested by Dillard, it is equally true that Dillard's counsel, as in the first phase of trial, *never* objected to any of the 11 jury instructions given in the punitive damages phase of trial. 9/29/97 Tr. 18. Thus, Dillard's newly raised objection to the net worth instruction, cited at pages 6-7 of its petition, is tardy by any conceivable measure.

The district court gave the financial condition instruction only after instructing the jury to consider a variety of factors including, but not limited to, the reprehensibility of Dillard's conduct, society's goal of punishment and deterrence, and the reasonable relationship to the harm that had already occurred. 2 AA 354-65. Moreover, the district court specifically instructed the jury:

> Punitive damages shall not be awarded through passion and prejudice. The award of punitive damages which is in the discretion of the jury should not be used because the defendant constitutes the class known as big business.

Id. at 357. Unlike the foregoing instruction and those covering other factors, which required mandatory consideration, the instruction regarding consideration of Dillard's net worth was permissive in nature. *Id.* at 363.

Pursuant to NEV. REV. STAT. § 42.005(4), Beckwith did not introduce evidence of Dillard's financial condition until the punitive damage phase of trial. Dillard devotes

much of its petition to complaints regarding Beckwith's examination of Dillard executives about the company's financial condition. Like the jury instructions discussed *supra*, Dillard's counsel *never* objected during the examinations on any substantive grounds. 9/29/97 Tr. 28-57.

Dillard, also for the first time, similarly complains in its petition that Beckwith's counsel's closing argument "focus[ed] entirely on Dillard's wealth, size, and status as an out-of-state corporation." Pet. 7. Dillard is wrong. Beckwith's counsel began his closing argument by directing the jury to the district court's instructions and stressing the described goals of punishment and deterrence contained therein. 9/29/97 Tr. 58-59. When Beckwith's counsel did mention Dillard's wealth, most of the statements were quoted directly from Dillard's own annual reports and were discussed in the context of punishment and deterrence ("We leave it to your collective wisdom and understanding of the facts, taken in tandem with your understanding of the irreprehensible [sic] conduct and the harm done to my client to arrive at a number that is going to act as a deterrent and punishment to this corporation."). *Id.* at 63-67.

Beckwith's counsel never argued that the jury should impose punitive damages because Dillard was a so-called "out-of-state corporation." Similarly, Dillard's claim that Beckwith's counsel "repeatedly pleaded with the jury to 'pound' Dillard," Pet. 8, is taken out of context. Beckwith's counsel did not use the word "pound" because Dillard was big or an out-of-state corporation, but because one of Dillard's divisional presidents had taken the stand during trial and lied that Beckwith had been terminated for poor performance when all evidence was to the contrary. 9/29/97 Tr. 80-84. And while Dillard did

object to Beckwith's use of the Fortune 500 prior to closing arguments, it *never* objected to the foregoing or any other allegedly prejudicial remarks during or after the closings.

After deliberating for several hours, the jury again returned a verdict in Beckwith's favor, awarding her $2.8 million in punitive damages for her constructive discharge claim and $1.4 million in punitive damages for her emotional distress claim.

3. Dillard filed a motion for judgment notwithstanding the verdict and numerous attachments. 2 AA 366-455. Although Dillard raised numerous challenges to the jury's verdict, the only ground upon which it sought a reduction of the punitive damages award was state-based. *Id.* Specifically, Dillard argued that the punitive damages must be reduced to comply with NEV. REV. STAT. § 42.005(1)(a), which caps punitive damages at three times the amount of compensatory damages awarded when they exceed $100,000. 2 AA 368. Beckwith did not oppose this request, and the district court granted the relief sought by reducing the award more than $2.3 million (from $2.8 million to $1,272,084 on the discharge claim and from $1.4 million to $600,000 on the emotional distress claim). 10/30/97 Tr. 19-21.

At no time in its 16-page motion or its 18-page reply did Dillard ever cite *BMW*, "due process," the "Fourteenth Amendment," or the "Federal Constitution." Dillard also failed to present any argument regarding the "wealth" issue or Beckwith's counsel's closing argument during the punitive damage phase. At the hearing on the postverdict motions, the district court judge emphasized that he "want[ed] to give Mr. Lee and Mr. Ales and Mr. Ray an opportunity to say anything they want to say."

10/30/97 Tr. 3. Remarkably, Dillard still failed to raise any of the issues about which it now so petulantly complains.

In denying the remainder of Dillard's JNOV motion, the district court judge found that Dillard had "just trampled on [Beckwith's] rights," and further characterized its conduct as "unbelievable stupidity" and "incredible." 2 RA 485. This assessment was consistent with previous observations of Dillard's conduct throughout the course of pre-trial proceedings where one district court judge described Dillard as "brazen," and another jurist found Dillard intent upon causing Beckwith "as much grief as possible, whether it be within or without the rules." 1 RA 10-11; 2 RA 455-56.

D. Nevada Supreme Court Proceedings

In its 25-page opening brief Dillard never even mentioned, let alone analyzed, *BMW's* guideposts and how the punitive damage award was allegedly excessive thereunder. Again, Dillard never mentioned "due process," the "Fourteenth Amendment," or the "Federal Constitution." And Dillard never presented any argument regarding Beckwith's counsel's closing argument in the punitive damages phase.

Instead, Dillard made scattered citations to *BMW* for the sole proposition that it precluded the jury's consideration of a company's nationwide worth when assessing punitive damages. In response, Beckwith analyzed *BMW* and acknowledged its holding that one state cannot impose punitive damages to punish a defendant for its lawful conduct in another state. Respondent's Answering Br. 37. Beckwith pointed out, however, that she had never

argued that Dillard should be punished for conduct outside Nevada. *Id.* at 38. Beckwith also argued that *BMW* never addressed the relevant scope of inquiry into a defendant's financial condition when assessing punitive damages. *Id.* Accordingly, Beckwith directed the Nevada Supreme Court to relevant state law precedent that had allowed the consideration of a corporate defendant's net worth. *Id.*

Though Dillard expanded arguments on other issues in its 41-page reply brief, it still failed to conduct any meaningful analysis of *BMW* other than vague references that consideration of Dillard's net worth was tantamount to punishment for out-of-state conduct. Appellant's Reply Br. 15-16. Again, Dillard never mentioned *BMW's* guideposts or how the award was excessive thereunder. Instead, it argued simply that the punitive damage award must be "vacated." *Id.* at 14.

On December 13, 1999, the Nevada Supreme Court, sitting *en banc*, issued its unanimous opinion affirming the district court's judgment in its entirety. With respect to the punitive damage award, the Nevada Supreme Court squarely addressed the only issue raised by Dillard, to wit: whether it was improper to allow the jury's consideration of Dillard's nationwide net worth. App. 9a-10a. The Nevada Supreme Court based its decision on state law precedent that had long allowed the consideration of a company's nationwide net worth when assessing punitive damages. *Id.* The Nevada Supreme Court did not conduct an excessiveness analysis under *BMW* because Dillard never presented this claim. The Nevada Supreme Court also recognized that the district court had

properly reduced the award by over $2.3 million pursuant to the legislative enactment embodied in NEV. REV. STAT. § 42.005(1)(a). *Id.*

Dillard filed a 10-page petition for rehearing with the Nevada Supreme Court on January 3, 2000. Like so many of the papers and arguments presented by Dillard below, the rehearing petition is notable not for what it says but, rather, what it fails to say. Dillard never argued, as is required under Rule 40(a) of the Nevada Rules of Appellate Procedure, that the Nevada Supreme Court overlooked or misapprehended its *BMW*-based argument. Resp. App. 10a-25a. Indeed, Dillard never even cited *BMW* or raised the allegation that the Nevada Supreme Court failed to conduct a proper constitutional analysis thereunder. *Id.* Dillard's chronic failure in this regard is telling given its extensive, albeit unsuccessful, arguments that the Nevada Supreme Court had misapprehended or overlooked other court opinions on issues unrelated to the punitive damage question. *Id.*

The Nevada Supreme Court denied Dillard's petition for rehearing on February 22, 2000. App. 20a.

REASONS FOR DENYING THE WRIT

Just four years after this Court decided *BMW* and less than three months after it denied Ford's attempt to revisit that case, Dillard and its new counsel, recycling the same arguments they made when representing Ford, claim this Court's review is necessary to "resolve conflicts and confusion that have arisen since *BMW* . . . and to ensure that . . . the guideposts continue to have meaningful effect." Pet. 10. Citing unrelated cases involving punitive damage awards in the billions and hundreds of

millions of dollars, Dillard contends that lower courts have continued to uphold excessive awards on grounds entirely inconsistent with *BMW*, including a defendant's nationwide wealth. *Id.*

Ironically, Dillard asks this Court to ensure that *BMW's* guideposts "continue to have meaningful effect" in a case where the defendant never even mentioned *BMW's* guideposts or presented the question of excessiveness thereunder. This Court uses its precious resources to decide cases and controversies under Article III of the Constitution, not the policy agendas of law firms that seek to apply verbatim legal arguments to factually, procedurally, and legally distinct cases in hopes of pushing through a version of judicially enacted tort reform.

When the case below is actually analyzed, it is clear that Dillard received all the procedural and substantive due process to which it is entitled. As a threshold issue, Dillard did not properly present a federal claim of excessiveness to the Nevada Supreme Court. Even if Dillard had properly presented a claim below, the question presented in Dillard's petition is not worthy of review in light of the specific facts of this case. The Nevada legislature has enacted strict laws governing the guidelines and procedures for imposing punitive damages, including quantitative limits thereon. Here, the district court reduced the punitive damage award by over 55% to comply with these legislative safeguards, and the Nevada Supreme Court reviewed the jury's verdict on the narrow ground requested by Dillard and affirmed the verdict in accordance with established law.

I. THE QUESTION OF EXCESSIVENESS UNDER *BMW'S* GUIDEPOSTS IS NOT PROPERLY BEFORE THE COURT BECAUSE IT WAS NEITHER PRESSED NOR PASSED UPON IN THE NEVADA SUPREME COURT.

Dillard asks this Court to grant certiorari because the decision below directly conflicts with *BMW* and other decisions of this Court. Pet. 10. The purported "conflict," according to Dillard, arises from the Nevada Supreme Court's lack of "any inquiry whatsoever into the necessary due process guideposts" and its "utter[ ] disregard [of] the *BMW* analysis." *Id.* at 10. Dillard, however, ignores this Court's pronouncement that:

> [w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . and the aggrieved party bears the burden of defeating this assumption [ ] by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here.

Adams v. Robertson, 520 U.S. 83, 86-87 (1997) (per curiam) (citations and internal quotation marks omitted). Dillard cannot satisfy the foregoing burden under any of this Court's recognized methods for proper presentation. *Id.* at 87.

In 66 pages of appellate briefs, Dillard never presented a federal claim of excessiveness under *BMW's* guideposts to the Nevada Supreme Court. Instead, Dillard argued solely that it was improper for the jury to consider a corporate defendant's nationwide net worth when assessing punitive damages. Appellant's Opening Br. 22-23; Appellant's Reply Br. 15-16. While Dillard made scattered references to *BMW* in three pages of its briefs, it

never mentioned, as it repeatedly does now, the due process guideposts, the "Fourteenth Amendment," the "Commerce Clause," or the "Federal Constitution." This Court has instructed that "the vague appeal to constitutional principles does not preserve [a petitioner's] . . . due process claims. A party may not preserve a constitutional challenge by generally invoking the constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). Nor does the discussion of a potentially relevant federal case in the context of an unrelated argument qualify as sufficient presentation to the state court. *Adams*, 520 U.S. at 88. At best, that is all Dillard did in its appellate briefs.

Dillard's petition for rehearing similarly failed to present a federal claim with " 'fair precision and in due time.' " *Id.* at 87-88 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). Dillard devotes much energy to excoriating the Nevada Supreme Court for a "wholesale abdication of its constitutional responsibility to provide meaningful review of punitive damages awards" under *BMW* and this Court's other precedent. Pet. 12-15. When given the opportunity to address this alleged "wholesale abdication," however, Dillard *never* even raised the subject as a basis for its 10-page petition for rehearing. Resp. App. 10a-25a. Dillard's utter failure in this regard is fatal under Rule 40(a) of the Nevada Rules of Appellate Procedure, which requires a petition for rehearing to "state briefly and with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended. . . . ***[A]ny claim that this court has overlooked or misapprehended a material question of law or has overlooked,***

misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where the petitioner has raised the issue." (emphasis added).

By attempting to present these claims now, Dillard invites this Court to disturb the finality of a Nevada judgment "on a federal ground the state court did not have an occasion to consider." *Adams*, 520 U.S. at 90. This Court has characterized such a request as " 'unseemly in our dual system of government.' " *Id.* (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)). The Court should deny Dillard's invitation.

II. THE AWARD DOES NOT VIOLATE DUE PROCESS.

Even if Dillard properly presented a claim below, its petition for certiorari should be denied on the merits. Dillard cannot establish that the procedures employed in the district court and Nevada Supreme Court were unfair. Nor can Dillard establish that *BMW* rendered consideration of wealth, as one of many factors, impermissible when determining the propriety of a punitive damage award.

A. Dillard's Belated Attack On The Procedures Employed Below Is Wholly Without Merit.

When reviewing challenges to punitive damage awards rendered in state courts, this Court has repeatedly acknowledged that if "fair procedures were followed, a judgment that is the product of that process is entitled to a strong presumption of validity. . . . " *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22-40 (1991)

(Scalia, J., concurring in judgment)); *BMW*, 517 U.S. at 586-87 (Breyer, J., concurring). Though Dillard's petition makes new-found objections to the procedures employed below, it cannot overcome the judgment's "strong presumption of validity."

1. Legislative Enactments

In 1989, the Nevada legislature enacted statutory provisions governing the guidelines and procedures for imposing punitive damages in Nevada. NEV. REV. STAT. § 42.005. These provisions include a variety of measures to curtail punitive damage awards. For example, with certain exceptions not relevant here, punitive damage awards are capped at three times compensatory damages if they equal $100,000 or more, and at $300,000 if the compensatory damages are less than $100,000; trials must be bifurcated with separate proceedings for a punitive damages determination; and evidence of the defendant's financial condition is not admissible until commencement of the separate proceeding. NEV. REV. STAT. § 42.005(1)(a), (3)-(4). In 1995, the Nevada legislature further refined this area by establishing uniform definitions for the terms "conscious disregard," "fraud," "malice, express or implied," and "oppression." NEV. REV. STAT. 42.001.

Members of this Court have repeatedly recognized the procedural safeguards provided by such enactments, *see BMW*, 517 U.S. at 595 (Breyer, J., concurring); *id.* at 613-614 (Ginsburg, J., dissenting) (Appendix); *TXO*, 509 U.S. at 472 (Scalia, J., concurring in judgment), and there is no question they were adhered to in the case below. The district court bifurcated the trial, and the punitive damage jury instructions given at the conclusion of the first phase were taken directly from NEV. REV. STAT.

§§ 42.001; 42.005. Resp. App. 1a-3a. Beckwith's counsel was not permitted to introduce evidence of Dillard's wealth until the subsequent proceeding on punitive damages, and the district court, upon Dillard's request and without objection from Beckwith, reduced the award by more than 55% when the jury's verdict exceeded three times the compensatory damages previously awarded.

Obviously unable to grapple with the safeguards provided by Nevada's statutory scheme, Dillard simply declares in a single footnote that the award is still unconstitutional under *BMW*. Pet. 15 n. 3. Predictably, Dillard provides no legal authority or analysis to support its conclusory arguments. *Id.*

2. The Jury Instructions

The jury instructions given in this case provided more protection than those previously at issue in cases before this Court. The punitive damage jury instructions given in the first phase of trial were directly based on Nevada statutes and, unlike the instruction at issue in *TXO*, 509 U.S. at 464 n. 29, required punitive damages (i.e., malice or oppression, as defined) to be proven by the heightened standard of clear and convincing evidence. Resp. App. 1a-2a. In the second phase, the district court gave 11 additional instructions to assist the jury in making a fair decision. 2 AA 354-65.

The second set of instructions provided specific standards to guide the jury's discretion when determining the amount of the award, including consideration of: (1) deterrence and punishment; (2) culpability and blameworthiness of the conduct; (3) vulnerability and the injury suffered by the injured party; (4) offensiveness of the conduct when compared to societal values; (5) the

reasonable relationship between the amount of punitive damages and the harm that had already occurred; (6) the reprehensibility of Dillard's conduct considering the whole record; (7) mitigating factors; and, (8) the financial condition of the defendant. *Id.* These instructions were more detailed than those approved by the majority in *Haslip*, 499 U.S. at 19-20, and closely resemble the "*Green Oil* factors" that Justice O'Connor suggested would be a better guide for Alabama juries in that case. *Id.* at 51-52 (O'Connor, J., dissenting).

While the instructions here allowed the jury to consider Dillard's net worth, this instruction was permissive in nature and was only given after instruction on the other factors. 2 AA 363. The district court also instructed the jury that it could not award punitive damages against Dillard simply because it was "big business," 2 AA 357, and no instruction contained the troubling references to "additional compensation," requiring "a larger fine upon one of larger means." *TXO*, 509 U.S. at 490-91 (O'Connor, J., dissenting), or to the award being "entirely discretionary with the jury." *Haslip*, 499 U.S. at 6 n. 1. Because Dillard never objected to a single punitive damage instruction that was given to the jury, its new-found objection to the net worth instruction is barred under Nevada law. *See Wagon Wheel Saloon & Gambling Hall, Inc. v. Mavrogan*, 369 P.2d 688 (Nev. 1962); Nev.R.Civ.P. 51.[3]

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[3] Dillard's tardy objections to Beckwith's counsel's closing argument are also time-barred. *Beccard v. Nevada National Bank*, 657 P.2d 1154, 1156 (Nev. 1983) ("failure to object to allegedly prejudicial remarks at the time argument is made . . . strongly indicates that party . . . did not consider the arguments objectionable at the time they were delivered, but made the claim as an afterthought.").

3. Postverdict Review

Dillard filed a 16-page motion for judgment notwithstanding the verdict and an 18-page reply. Dillard never mentioned "*BMW*", "due process," the "Fourteenth Amendment," the "Commerce Clause," or the "Federal Constitution." Instead, Dillard's only challenge to the punitive damage verdict was that it must be reduced pursuant to NEV. REV. STAT. § 42.005(1)(a). After conducting a lengthy hearing where Dillard's counsel had "an opportunity to say anything they want[ed] to say," 10/30/97 Tr. 3, the district court reduced the punitive damage award by over 55% to comply with the Nevada statute. Dillard never presented any federal claim regarding the punitive damage award.

In its briefs before the Nevada Supreme Court, Dillard made passing references to *BMW* for the sole proposition that it was improper for the jury to consider a company's nationwide net worth when assessing punitive damages. Appellant's Opening Br. 22-23; Appellant's Reply Br. 15-16. The Nevada Supreme Court rejected Dillard's argument, basing its decision on state grounds that had long allowed the consideration of a company's net worth as one of many factors when assessing punitive damages. App. 9a-10a (citing *Ainsworth v. Combined Ins. Co.*, 763 P.2d 673 (Nev. 1988)). The Nevada Supreme Court did not perform an excessiveness analysis under *BMW* because Dillard never presented such a claim.

The lack of a *BMW* analysis does not, however, support Dillard's baseless contention that Nevada leaves evaluation of punitive damage awards "solely to the 'unreviewable discretion of the jury,' " Pet. 14, thereby denying due process to corporate defendants. Pet. 15. First, the foregoing language that Dillard placed in quotes

at page 14 of its petition is not found anywhere in the Nevada Supreme Court's opinion. App. 9a-10a. Second, Dillard could have asked the Nevada Supreme Court to review the award for excessiveness under *BMW* or state law since "[e]very [ ] State in the Union affords postverdict judicial review of the amount of a punitive damages award. . . . " *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 427-28 (1994). This is certainly true in Nevada where its highest court has not hesitated to review and reduce punitive damage awards against corporate defendants under standards entirely consistent with those articulated in *BMW*. *See, e.g., Wholers v. Bartgis*, 969 P.2d 949, 961-62 (Nev. 1998) (where award was disproportionate to degree of defendants' reprehensibility and blameworthiness, punitive damage award against nationwide insurer and its administrator reduced from $7.5 million to $3.75 million and from $500,000 to $150,000, respectively, despite one defendant's net worth of $300 million); *Guaranty Nat'l Ins. Co. v. Potter*, 912 P.2d 267, 273 (Nev. 1996) (punitive damage award against nationwide insurer reduced as excessive punishment from $1 million to $250,000 despite defendant's net worth exceeding $100 million); *Republic Insurance v. Hires*, 810 P.2d 790, 793 (Nev. 1991) (punitive damage award against nationwide insurer with net worth exceeding $170 million reduced from $22.5 million to $5 million as excessive of the amount needed to deter given the degree of blameworthiness and harmfulness of defendant's conduct).

The Nevada Rules of Appellate Procedure provide an aggrieved party with the opportunity to petition the Nevada Supreme Court for rehearing when the court has purportedly overlooked or failed to consider controlling authority. Nev.R.App.P. 40(a). Though Dillard filed a 10-

page petition for rehearing, it never challenged the Nevada Supreme Court's ruling on the punitive damage award. Resp. App. 10a-25a. When a party fails to avail itself of procedural safeguards, it has no basis to later complain that it was denied due process. *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 38-39 n. 21 (1990). That is exactly what Dillard has done here; it cannot overcome the judgment's "strong presumption of validity."

B. The State Courts' Continued Use Of Wealth As An Additional Common Law Factor To Measure Deterrence Does Not Present A Question Worthy Of Review.

Dillard's claim that *BMW* prohibits the states from considering factors other than *BMW's* three guideposts when reviewing a punitive damage award for excessiveness is flatly wrong. The lower courts are not in conflict on this question, and this issue is not important, substantial or recurring.

1. Neither The Fourteenth Amendment Nor *BMW* Prohibits States From Allowing Juries And Courts To Consider A Defendant's Wealth When Determining The Propriety Of A Punitive Damage Award.

BMW affirmed that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition" and that "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." 517 U.S. at 568. Nevada, like the vast majority

of states that have considered the issue, has determined that a defendant's wealth is an appropriate consideration when determining the propriety of a punitive damage award. *Annotation, Punitive Damages: Relationship to Defendant's Wealth As Factor in Determining Propriety of Award,* 87 A.L.R.4th 141 (1991) (collecting cases). This state practice is consistent with views espoused in legal treatises and commentaries, *see, e.g.*, RESTATEMENT (SECOND) OF TORTS § 908(2) (1977); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 15 (5th ed. 1984); 1 JAMES D. GHIARDI, PUNITIVE DAMAGES LAW AND PRACTICE § 5.36 (1985), and has been historically approved by this Court, provided it is not the sole basis for assessing or upholding an award. *BMW,* 517 U.S. at 591 (Breyer, J., concurring); *TXO,* 509 U.S. at 462, and n. 28 (plurality opinion); *id.* at 491-92 (O'Connor, J., dissenting); *Haslip,* 499 U.S. at 21-22.

Nothing in *BMW* renounced the near universal principle that "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded." *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 270 (1981). Nor does *BMW* preclude courts from considering a defendant's wealth when reviewing punitive damage awards for excessiveness. Instead, the majority in *BMW* created three "guideposts" to ensure "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574-75.

Even though Dillard never properly presented the issue, there is no question it received adequate notice in the case below. Longstanding Nevada law made clear that punitive damages could be imposed against Dillard for constructively discharging Beckwith in violation of

public policy, *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984); *Martin v. Sears, Roebuck and Co.*, 899 P.2d 551 (Nev. 1995), and intentionally inflicting emotional distress upon her. *Ramada Inns, Inc. v. Sharp*, 711 P.2d 1 (Nev. 1985); *Shoen v. Amerco, Inc.*, 896 P.2d 469 (Nev. 1995). Further, Nevada law put Dillard on notice that punitive damages equal to three times the amount of compensatory damages could be awarded if the latter exceeded $100,000. NEV. REV. STAT. § 42.005(1)(a). And Dillard had notice of the amount of compensatory damages being sought by Beckwith, conceded the accuracy of that amount, and advised the jury that it was "not going to argue the numbers." Respondent's Answering Br. 17. Even now, Dillard has *never* challenged the award here under any of *BMW's* guideposts.

The word "guidepost" indicates the majority's framework is a guide only, not an exclusive formula. As the dissenting opinion summarizes, "the Court nowhere says that these three 'guideposts' are the only guideposts; indeed it makes very clear that they are not – explaining away the earlier opinions that do not really follow these 'guideposts' on the basis of additional factors, thereby 'reiterat[ing] our rejection of a categorical approach.' " *BMW*, 517 U.S. at 606 (Scalia, J., dissenting). Similarly, the concurring Opinion discusses Alabama's consideration of the defendant's financial condition, and concludes that "since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its response to economic incentives)." *Id.* at 591 (Breyer, J., concurring). After acknowledging that this

factor may inflate awards when the defendant is wealthy, the concurring Opinion nonetheless concludes that "does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of the other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *Id.*

The foregoing reasoning echoes this Court's previous findings that "under well-settled law," factors such as evidence of a defendant's impressive net worth "are typically considered in assessing punitive damages." *TXO*, 509 U.S. at 462 n. 28 (citing *Haslip*, 499 U.S. at 21-22). Even the four dissenting Justices in *TXO* conceded that consideration of a defendant's wealth was not unconstitutional and that this factor was long thought to be relevant. *Id.* at 491-92 (O'Connor, J., dissenting). The teaching of these cases is that "the factfinder must be guided by more than just the defendant's net worth." *Haslip*, 499 U.S. at 22. Here, the district court followed this admonition by instructing the jury on numerous factors besides Dillard's wealth. Dillard conceded that its wealth was relevant, objecting only to the scope of this inquiry. On appeal, the only question even remotely presented on this subject was whether the jury could consider Dillard's nationwide net worth when assessing punitive damages, and the Nevada Supreme Court answered in the affirmative, basing its decision on longstanding state common law.

This Court has consistently approved the common law method for assessing punitive damages, noting that it would need a "strong case" for the Fourteenth Amendment to affect something that has been practiced by common consent for over two hundred years. *Haslip*, 499 U.S. at 15-17. The instant matter is no such case, particularly

when one considers Dillard's repeated failure to properly present an excessiveness claim below, Nevada's extensive legislative enactments, the detailed nature of the jury instructions, Dillard's repeated failure to avail itself of procedural safeguards during postverdict review, and the comparatively small amount of the remitted punitive damage award here vis-à-vis the unrelated awards that Dillard cites in a transparent attempt to "jar [the Court's] constitutional sensibilities" (*e.g.*, $1.87 million vs. $1.09 billion, $290 million, and $250 million, Pet. 10). *Id.* at 18. Put simply, the judgment in this matter does not violate due process merely because Beckwith introduced evidence of Dillard's net worth.

2. There Is No Irreconcilable Conflict In the Cases Interpreting *BMW*.

To obtain certiorari, Dillard must demonstrate a real or intolerable conflict in the law on an important question of federal law that is irreconcilable, and not subject to a permissible difference of opinion by the state courts. ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE §§ 4.3; 4.4 (6th ed. 1986). Dillard suggests that numerous courts are using a defendant's wealth to "trump the constitutional analysis mandated by *BMW*" or as a "proxy" for a "proper" analysis under *BMW*. Pet. 15-20. Again, it must be stressed that Dillard never presented this claim to the Nevada Supreme Court. At best, Dillard argued solely that it was improper *for the jury* to consider a defendant's wealth when assessing punitive damages. When given the opportunity to present the question of whether a reviewing court may consider a defendant's wealth as part of an excessiveness analysis, Dillard filed a petition

for rehearing that was conspicuously silent on this issue. Resp. App. 10a-25a.

In any event, the vast majority of state and federal cases faithfully apply *BMW's* guideposts – when a claim is properly presented – to determine whether a punitive judgment is excessive. Those cases also review a number of other common law factors, including economic wealth, when making this determination. That the lower courts do not limit their analysis to *BMW* does not, however, represent a conflict with this Court's precedent. Instead, courts addressing the excessiveness question continue to apply both federal and state factors, and make a dual analysis under both state common law and federal due process principles. While lower courts may differ in the emphasis they place on a defendant's financial condition, any difference simply reflects the unique history of each state's common law, a uniqueness that is inherent in our dual system of government.

3. This Issue Is Not Important, Substantial Or Recurring.

In a final plea to have this Court grant certiorari, Dillard rolls out additional constitutional artillery, citing a string of cases for the propositions that (i) punishment based solely on status violates the Equal Protection Clause and the Eighth Amendment's prohibition against cruel and unusual punishment, and (ii) a state's attempt to impose taxes outside its borders violates the Commerce Clause. Pet. 21-23.[4] Of course, neither scenario is present here nor were such claims presented below.

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[4] Notably, in the context of the Eighth Amendment's Excessive Fines Clause, Justice O'Connor rejected the argument

Dillard is not being punished for having wealth outside of Nevada: it is being punished for its culpable behavior within the State. Having engaged in that intentional conduct, Dillard is not afforded immunity because it chooses to operate nationwide. Rather, Dillard must be treated the same as all corporations, including those engaged solely in intrastate operations. If the Court were to accept the rationale Dillard posits, multi-state companies would be able to dilute any one state's ability to assess a deterrent award to protect its own interests. *BMW* never intended to shield non-resident corporations from their own wrongdoing simply because of their non-resident status. To the contrary, *BMW* reaffirmed that evidence of improper out-of-state transactions is still "relevant to the determination of the degree of reprehensibility of the defendant's conduct." 517 U.S. at 574 n. 21 (citing *TXO*, 509 U.S. at 462 n. 28).

In the end, Dillard's petition is simply an afterthought manufactured by Dillard's new counsel and filled with recycled arguments from Ford's recently unsuccessful petition. Those recycled arguments cannot, however, rescue Dillard from its repeated procedural failings below. Nor can Dillard's primary focus on inapposite and extreme punitive damages cases justify certiorari review given this Court's observation that "[b]ecause no two cases are truly identical, meaningful comparisons of

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that wealth of a defendant should not be taken into account when assessing the amount of a punitive damage award, characterizing the argument "as a historical matter, . . . weak indeed." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part) (citing Magna Carta and Blackstone, Commentaries).

such awards are difficult to make." *TXO*, 509 U.S. at 457. This is especially true here given the facts of the instant case, the amount of the remitted award, and the extensive procedural safeguards provided by Nevada's legislature and its courts.

CONCLUSION

The petition should be denied in all respects.

Respectfully submitted this 2nd day of June, 2000.

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DISTRICT COURT

CLARK COUNTY, NEVADA

DELORIS BECKWITH Plaintiff, vs. DILLARD DEPARTMENT STORES, INC., a Delaware Corporation; DILLARD'S NEVADA, INC., a Nevada Corporation; MARIA ROKOVITZ, an individual; and DOES I through X, inclusive, Defendants.	)	CASE NO: A364772 DEPT NO: VII DOCKET: P

JURY INSTRUCTIONS

* * *

INSTRUCTION NO. 53

If you find defendant Dillard's liable for tortious constructive discharge in violation of public policy or any defendant liable for intentional infliction of emotional distress, then you are to determine whether there should also be an award for damages by way of example and punishment, which are called "punitive damages," against any of those found liable.

For an award of punitive damages to be authorized, you must first find, by clear and convincing evidence, that the defendants have been guilty of oppression, fraud or malice, express or implied, as will be explained.

If you make a finding on your verdict form that punitive damages will be assessed, you will be asked to deliberate again at a time convenient to the Court and the Jury for purposes of assessing the amount of such damages.

INSTRUCTION NO. 54

The plaintiff has the burden of proving by clear and convincing evidence all of the facts necessary to establish her entitlement to punitive damages.

"Clear and convincing" evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

INSTRUCTION NO. 55

"Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

In turn, "conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid these consequences.

INSTRUCTION NO. 56

"Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

Again, "conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid these consequences.

INSTRUCTION NO. 61

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be and by the law as given you in these instructions, and return a verdict

which, according to your reason and candid judgment, is just and proper.

GIVEN this 16 day of September, 1997

/s/ Mark Gibbons
DISTRICT JUDGE
MARK GIBBONS

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SUPREME COURT OF THE STATE OF NEVADA

DILLARD'S, INC., a Delaware Corporation, formerly known as DILLARD DEPARTMENT STORES, INC., Appellant, vs. DELORIS BECKWITH, Respondent.	**SUPREME COURT NO. 31378** District Court Case No. A364772

MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR STAY OF REMITTITUR PENDING APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI

COMES NOW, Dillard's, Inc. ("Dillard's"), by and through its counsel, John Peter Lee, Ltd. and files this Motion for Leave to File Reply in Support of Motion for Stay of Remittitur Pending Application to the Supreme Court of the United States for a Writ of Certiorari.

Dillard's requests the Court to enter an order granting Dillard's leave pursuant to N.R.A.P. 27(a) to file a

Reply in Support of Dillard's Motion for Stay of Remittitur Pending Application to the Supreme Court of the United States for a Writ of Certiorari.

In Beckwith's Response dated January 24, 2000, Beckwith makes two invalid arguments. First, Beckwith argues Dillard's Petition for Rehearing to be an improper re-argument of matters presented in Dillard's Opening and Reply Briefs under N.R.A.P. 40(c). Dillard's argues in its Petition for Rehearing that the Court overlooked the material fact of Beckwith's admission that she was not willing to accept reasonably comparable employment or even virtually identical employment because she was not willing to accept any employment. Her attorney required her to be at his "beckon call" for the litigation, and she "couldn't take a job and be off all those hours". 1 Appellant's Appendix, Vol. 4. Dillard's properly provides in its Petition for Rehearing the citations to its brief and to the record as required by N.R.A.P. 40(a).

Additionally, Dillard's provides argument authorized under N.R.A.P. 40(a) concerning the Court's Opinion rendered December 13, 1999 concerning material issues of law overlooked by the Court. Contrary to Beckwith's assertion, Dillard's does not re-argue its brief but argues the grounds for rehearing and provides citations to the brief for the pertinent, original arguments as the Rule requires.

Dillard's Petition for Rehearing is proper under N.R.A.P. 40, and Dillard's Motion for Stay is proper under N.R.A.P. 41. Beckwith acknowledges that her January 24, 2000 Response is not the proper form to address Dillard's

Petition for Rehearing, but Beckwith nonetheless proceeds to attack the Petition, knowing that its attack is improper. See Beckwith's Response, page 1, lines 22 through 26.

Second, Beckwith invalidly argues that Dillard's has a fundamental misunderstanding of *BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed. 2d 809 (1996). On January 19, 2000, Ford Motor Company saw fit to file in the Supreme Court of the United States a Petition for Writ of Certiorari on exactly the same grounds as Dillard's discusses in its Motion for Stay. In its Petition, Ford's counsel states:

> State courts have been engaging in the same misuse of wealth as a proxy for a proper analysis of constitutional excessiveness under *BMW*. In *Dillard Department Stores, Inc. v. Beckwith*, 989 P.2d 882 (Nev. 1999), for instance, the Nevada Supreme Court recently upheld a punitive damage award of $1.87 million, rejecting the defendant's argument that premising the punishment on its "nationwide worth," violated *BMW's* limits on extraterritorial punishments. L.2 (excerpts from appellant's briefs in *Dillard*). In response, the Nevada Supreme Court failed even to mention *BMW*, and instead noted the "subjective nature of punitive damages and the absence of workable standards by which to evaluate the propriety of such an award." 989 P.2d at 887. The court expressly approved of the trial court's reliance on the defendant's "nationwide worth," and simply declared: "The award will not financially destroy or annihilate Dillard. Therefore, the punitive damage award is affirmed." *Id.* at 888.

Ford Motor Company cited this Court's December 13, 1999 Opinion as pertinent to the Supreme Court's consideration of Ford's Petition for Certiorari. A copy of Ford's Petition for Writ of Certiorari is attached hereto as Exhibit "1".

Beckwith's citation in its January 24, 2000 Response of a federal district court case from Kansas hardly "dooms any petition [Dillard's] ultimately files." Beckwith's Response, page 2, lines 4 through 13. Not only is Beckwith mistaken about *BMW* being allegedly irrelevant, but the issue is one of national, constitutional significance.

CONCLUSION

Beckwith admits to improperly addressing Dillard's Petition for Rehearing in Beckwith's January 24, 2000 Response. Dillard's has properly identified misapprehensions of fact and misapprehensions of material questions of law by the Court in Dillard's Petition for Rehearing. Dillard's has also correctly understood the constitutional significance of the *BMW* Opinion.

Dillard's requests the Court to enter an order granting Dillard's leave pursuant to N.R.A.P. 27(a) to file a Reply in Support of its Motion for Stay of Remittitur Pending Application to the Supreme Court of the United States for a Writ of Certiorari.

DATED this 28 day of January, 2000.

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SUPREME COURT OF THE STATE OF NEVADA

DILLARD DEPARTMENT STORES, INC., A DELAWARE CORPORATION; AND DILLARD'S NEVADA, INC., A NEVADA CORPORATION, Appellant, vs. DELORIS BECKWITH, Respondent.	**SUPREME COURT NO. 31378** On Appeal From the Eighth Judicial District Court Case No. A364772

PETITION FOR REHEARING

Pursuant to N.R.A.P. 40, Appellant Dillard Department Stores, Inc., a Delaware corporation and Dillard's Nevada, Inc., a Nevada corporation (together "Dillards") hereby petitions the Court for rehearing. Dillards files this petition because the Court has overlooked or misapprehended a material fact in the record and because the Court has overlooked or misapprehended a material question of law in its December 13, 1999 Opinion herein.

I. THE COURT OVERLOOKED AN IMPORTANT FACT AND PERTINENT AUTHORITIES CITED BY DILLARDS WHICH SHOW BECKWITH'S FAILURE TO MITIGATE.

In the Court's discussion of compensatory damages and the jury instructions on mitigation of damages, the Court overlooked the fact that Respondent Deloris Beckwith stopped looking for work because she chose to keep

all her time available to pursue litigation. The admission by Beckwith was plain and unequivocal. She stated:

> I was so busy, back and forth with this lawsuit and I was at Mr. Campbell's beckon call and I couldn't take a job and be off all those hours.

Transcript, Thursday, August 28, 1997, p. 99, l Appellant's Appendix 164. This was a highly material, indeed ordinarily dispositive, admission by Beckwith, but the Court did not address or mention this fact in its December 13, 1999 Opinion. Nowhere in the facts of the Opinion or in the legal analysis is Ms. Beckwith's statement, quoted above, considered. The Court appears to have overlooked or misapprehended this fact.

Concerning the applicable law, none of the cases cited by the Court or by any of the parties holds that the requirement of mitigation of damages is met by a plaintiff spending full time working on ligitation. In observing the definition of "substantially equivalent employment" used by the trial court below from the case, *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir. 1990), this Court stated at footnote 1 of the December 13, 1999 Opinion herein that trial courts should not use the *Sellers* instruction, which the trial court used in this case. In determining the error in usage of the *Sellers* instruction to be harmless, the Court focused upon a comparison of the terms, "substantial [sic] equivalent" and "reasonable alternative".

The Court does not include in its Opinion a discussion of the holding of *Sellers*. The employee-claimant in *Sellers* was not entitled to back-pay for the six-month

period when she filed no job applications. 902 F.2d at 1196.

Dillards cited *Sellers* in its Opening Brief at page 21, lines 23 and 24 as an example of one of the many courts which require actual mitigation efforts rather than the type of full-time litigation efforts Beckwith admitted to have pursued. This Court also overlooked in its December 13, 1999 Opinion the legal authorities Dillards cited on page 21, lines 12 through 27, which also require actual efforts at finding comparable employment. These authorities, which this Court overlooked in its December 13, 1999 Opinion are: *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231 (1982), *Odima v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995), *Sias v. City Demonstration Agency*, 588 F.2d 692, 697 (9th Cir. 1978) and *Payne v. Security Savings and Loan Ass'n*, 924 F.2d 109 (7th Cir. 1991).

Each of these cases cited by Dillards requires efforts to mitigate damages through actual seeking of comparable employment. None of these cases authorizes a terminated employee to mitigate damages through full-time pursuit of litigation. Dillards specifically quoted *Sias, supra*, as requiring more than "minimal efforts to mitigate damages by seeking other comparable employment and [more than the employee's devotion of] time and talents to the furtherance of the instant lawsuit." 588 F.2d at 697. Dillards' Opening Brief, p. 21, ll, 16, 17. In its December 13, 1999 Opinion, the Court overlooked all of these authorities Dillards cited from the Supreme Court of the United States and from the United States Circuit Courts of Appeals for the Ninth Circuit, the Seventh Circuit and the Fifth Circuit.

Dillards also argued in the same paragraph of the Opening Brief that Nevada's mitigation case, *Beales v. Hillhaven, Inc.*, 108 Nev. 96, 825 P.2d 212 (1992), is consistent with all of these federal cases in requiring willingness to accept comparable employment as an element of mitigation. Opening Brief, page 21, line 26. Indeed, Dillards' counsel has found no case throughout the United States setting a standard for mitigation of damages which allows a plaintiff employee to reserve her full-time availability for working on litigation rather than for seeking comparable employment as the position lost.

Although in its December 13, 1999 Opinion the Court discusses *Beales* and the fact there found that the plaintiff could not find employment in her field, the Court's analysis of *Beales* in its December 13, 1999 Opinion focuses upon the comparison of the *Beales* jury instruction to *Sellers, supra,* and to *Southern Pacific Transportation Co. v. Fitzgerald,* 94 Nev. 241, 243 577 P.2d 1234, 1235 (1978). December 13, 1999 Opinion, pp. 8, 9. The Court has overlooked or misapprehended the fact that Beckwith here chose to commit herself full-time to her litigation rather than to seeking employment. By no means does *Beales* conclude that full-time litigation efforts suffices to mitigate damages.

In *Beales,* the Court's comment that the plaintiff could not find other employment was part of a discussion of future damages, not of mitigation of damages. 108 Nev. at 101-02, 825 P.2d 215-16. In the December 13, 1999 Opinion, the Court did not address this aspect of *Beales* or its similarity to the federal cases Dillards cited for the standard of willingness to accept comparable employment, which standard courts uniformly include to satisfy the

requirement of mitigation of damages. Dillards is aware of no case holding that a party can simply present evidence of probability or improbably of finding comparable employment as a substitute for actual diligence in seeking comparable employment and as a substitute to accept comparable employment and as a substitute for *willingness* to accept employment to fulfill the requirement of mitigation of damages. In its December 13, 1999 Opinion, the Court overlooked the fact that Beckwith was unwilling to accept comparable employment, according to her own testimony, that she "couldn't take a job and be off all those hours" because she "was so busy back and forth with this lawsuit" at their attorney's "beckon call". (1 Appellant's Appendix 164 and Appellant's Opening Brief, pages 20, 21.)

The Court observed in its December 13, 1999 Opinion on page 10 that in *United Ass'n Journeyman v. Stine*, 76 Nev. 189, 218, 351 P.2d 965, 980-81 (1960), that this Court has stated that it cannot review a jury question where the proper standard for mitigation is stated. The Court also acknowledged in its December 13, 1999 Opinion on page 9 at footnote 1 that the trial court's instruction below on mitigation was not correct, although the Court considered it harmless error. Were it not for Beckwith's admission that she did not diligently seek comparable employment but chose instead to spend her full-time efforts on litigation, the Court's conclusion that the error was harmless might have been valid. Because the Court overlooked this fact, however, Dillards is prejudiced by the instruction, which unfairly placed the burden upon Dillards to show that a virtually identical job was available. It would not have mattered whether the job was equivalent, subject to

competitive interviewing or offered to her outright. Dillards is prejudiced because, as Beckwith testified, she was not willing to take a job.

In citing *Stine* in its December 13, 1999 Opinion, the Court assumed the jury instruction to be correct. In *Stine*, no admission of full-time effort toward litigation rather than seeking employment existed, however. Also, *Stine* did not contain an erroneous instruction on mitigation. In its reliance upon *Stine* in its December 13, 1999 Opinion, this Court overlooked the fact of Beckwith's choice to pursue litigation rather than employment. As stated above, the Court also overlooked the cases Dillards cited on mitigation in its Opening Brief.

The Court appears to have held that the instruction on mitigation offered by Dillards from *Southwest Trans. Co. v. Fitzgerald*, 94 Nev. 241, 577 P.2d 1234 (1978), was not necessary because *Fitzgerald* was a personal injury case. While it may not have been necessary to use an instruction from a personal injury action, the Court does not address the federal mitigation cases cited by Dillards hereinabove and on page 21 of Dillards' Opening Brief, which are consistent with the Nevada cases of *Fitzgerald, supra*, and *Beales, supra*.

Instead, the Court also states in its December 13, 1999 Opinion that under *Stine* a jury verdict on mitigation cannot be reviewed if the instruction on mitigation is correct. The Court acknowledges in its December 13, 1999 Opinion on page 9, footnote 1, that the *Seller* instruction was in error. Because the premise of *Stine* assumes a correct jury instruction, the holding of *Stine* does not apply to this case. Again, the Court's reliance upon *Stine*

overlooks Beckwith's admitted unwillingness and inability to take a job which would take her away from litigation of her multi-million dollar claim. Dillards' authorities, also overlooked by the Court, would disallow such litigation efforts as a substitute for mitigation of damages.

Dillards made similar arguments concerning the misstatement of a duty in a jury instruction as being generally grounds for reversal under *Mizushima v. Sunset Ranch, Inc.*, 103 Nev. 259, 266, 737 P.2d 1158, 1162 (1987) and *Stevens v. Duxbury*, 97 Nev. 517, 634 P.2d 1212 (1981). Dillards' Opening Brief, p. 12 and Dillards' Reply brief, pp. 1, 2, 4, 7, 8, 11, 14, 16, 17 and 20. The Court also overlooked these authorities in its December 13, 1999 Opinion.

Although the Court did not miscite any authorities, the Court did overlook Dillards' authorities on mitigation and on jury instructions on legal duty, and the Court did not include them in its discussion in the December 13, 1999 Opinion. These authorities are particularly important because of Beckwith's admission that she stopped looking for work so that she could work full-time on the litigation. Dillards requests rehearing pursuant to NRAP 40 in light of this important fact and in light of these important authorities which the Court overlooked concerning Beckwith's failure to mitigate her damages.

II. THE COURT OVERLOOKED THE *FALLINE* CASE CITED BY DILLARDS BOTH AS TO THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND AS TO PUNITIVE DAMAGES AS BEING UNAVAILABLE IN THE *WORKERS COMPENSATION SETTING*.

On pages 16 and 17 of the Opening Brief, Dillards argued that this Court's statements in *Valline v. G.N.L.V. Corp.*, 107 Nev. 1004, 823 P.2d 888 (1991), mean that emotional distress damages and punitive damages are unavailable in the workers compensation setting. Dillards quoted the following language from *Falline*:

> Appellants also contend that the district court erred in dismissing their cause of action for intentional infliction of emotional distress. We disagree. The synonym for this particular cause of action is the tort of outrage. We have previously held, in *Star v. Rabello*, 97 Nev. 124, 625 Pl.2d 90 (1981), that one of the elements of this tort is extreme and outrageous conduct. *Id.* at 125, 625 P.2d at 91-92. Moreover, we have inferred that "malicious intent" is a descriptive aspect of the tort of outrage. See *Branda v. Stanford*, 97 Nev. 643, 648, 637 P.2d 1223, 1227 (1981). In short, this particular tort would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case. *Moreover, recognizing a cause of action for emotional distress in the workmen's compensation context raises the specter of "almost every emotion-based case turning up as some kind of tort suit."* 2A A, Larson, The Law of Workmen's Compensation § 68.34(a) at 13-116 (1987 & Supp. 1990).

> Finally, *the Legislature has established the degree to which self-insurers should be punished for conduct of the type here present by imposing administrative fines in specific maximum amounts.*

Falline at 1013, 823 P.2d at 894 (emphasis added). This Court thereby affirmed in *Falline* the lower court's dismissal of the claim for intentional infliction of emotional distress based upon the alleged violation of the workers compensation statutes.

In its December 13, 1999 Opinion, the Court relied upon *Shoen v. Americo, Inc.*, 111 Nev. 735, 896 P.2d 469 (1995) for the proposition that the tort of intentional infliction of emotional distress can exist in an employment termination context. The Court overlooked Dillards' quoted authority from *Falline*, however.

The Court's overlooking of *Falline* is a material question of law because *Falline* was actually a workers compensation case whereas *Shoen* was not. The emotional distress claim was allowed in *Shoen* at least in part because a physical assault occurred against the plaintiff, a fact which is very distinguishable from the instant case. 111 Nev. at 747, 896 P.2d at 477. Indeed, in *Shoen* the Court dismissed a tortious discharge claim because of the availability of a statutory remedy under NRS 50.070. 111 Nev. at 744-45, 896 P.2d at 474-75. While it is technically true that *Shoen* allowed a tort claim for an intentional infliction of emotional distress in an employment setting, *Shoen* did not allow a tortious discharge claim where an alternative statutory remedy was available. Also, *Shoen* was not a workers compensation case.

In its December 13, 1999 Opinion, the Court overlooked the more pertinent authority of *Falline* to the workers compensation setting. It remains unclear whether the Court intends by its December 13, 1999 Opinion to overrule *Falline*. The Opinion overlooks *Falline* and does not mention it.

Additionally, the Court overlooked Dillards' citation of *Village Development Co. v. Filice*, 90 Nev. 305, 310, 526 P.2d 83, 86 (1974), for the proposition that a principal employer cannot be held liable on the basis of its agents' conduct where the agent is held not liable. Dillards made this argument on pages 17 and 18 of its Opening Brief. In its December 13, 1999 Opinion, the Court overlooked the fact that the jury absolved Dillards' agent, Defendant Maria Rokovitz, but found Dillards liable in direct contradiction to this Court's holding in *Filice*. Pursuant to NRAP 40, Dillards requests rehearing because the Court has overlooked material questions of law raised by Dillards under *Falline* and under *Filice*.

III. THE COURT OVERLOOKED MATERIAL QUESTIONS OF LAW RAISED BY DILLARDS CONCERNING HOW SELF-INSURED EMPLOYERS SHOULD APPLY THE PRIORITIES OF N.R.S. 616C.530 WITHIN THE CONTEXT OF THE WORKERS COMPENSATION STATUTORY SCHEME WHERE AN INJURED WORKER IS REPLACED *DURING HER ABSENCE*.

The Court acknowledges in its December 13, 1999 Opinion at page 5 that N.R.S. 616D.030 precludes private claims under the workers compensation statutes. The Court quoted Subsections 1 and 2 of the statute, which so

provide. Also on page 5 of its Opinion, the Court acknowledges that the statutory scheme applies only to administration of the act. In focusing upon Dillard's argument that the use of N.R.S 616C.510 created strict liability, the Court overlooked Subsections 2 through 4 of N.R.S. 616C.530.

NRS. 616C.530 states:

> **NRS 616C.530 Priorities for returning injured employee to work.** An insurer shall adhere to the following priorities in returning an injured employee to work:
>
> 1. Return the injured employee to the job he had before his injury.
>
> 2. Return the injured employee to a job with the employer he worked for before his accident that accommodates any limitation imposed by his injury.
>
> 3. Return the injured employee to employment with another employer in a job that uses his existing skills.
>
> 4. Provide training for the injured employee while he is working in another vocation.
>
> 5. Provide formal training or education for the injured employee in another vocation.

The statute plainly contemplates that injured employees may have been replaced while absent and that other "priorities" were also to be utilized. In its December 13, 1999 Opinion, the Court overlooked the other priorities set forth in the statute. Dillards argued that the selection of these priorities involves an analysis of the contact of

the factual setting within the overall statute. Dillards Opening Brief, pages 12 through 13.

The Court also overlooked the fact that the jury instruction used by the trial court below only referred to the first of the five priorities, which is to return the injured employee to the job he had before his injury. 2 Appellant's Appendix, 317. The Court overlooked the context of Subsection 1 within the overall statute and the overall statutory scheme.

Justice Maupin correctly noted in his concurring opinion that N.R.S. 616C.530 applies to workers compensation *insurers* and that the priorities do not govern an employer's re-assimilation of an injured worker to the work place. Justice Maupin states that the instruction was couched in terms of a specific duty that did not apply to employers. Justice Maupin is correct, but again the Court, including Justice Maupin, overlooked *Mizushima* and *Stevens* and the entitlement of parties to jury instructions which correctly state the legal duty to apply to the facts of the case.

Justice Maupin observed that the statutory language did not add to the standard of recovery Beckwith was required to show, and he therefore concluded the statutory instruction to be harmless error. Justice Maupin overlooked the fact that the incorrect statement of the duty in fact lessened the standard which Beckwith was required to show and that Dillards was prejudiced thereby because the jury was instructed that the mere failure to give Beckwith her job back was a violation of public policy. This is what Beckwith's counsel repeatedly argued, and this is what the trial court assumed the trial

was all about, as Dillards argued extensively in it [sic] Opening Brief, pages 2 through 9. The other eight Justices overlooked Justice Maupin's correct observation that the statute upon which Beckwith so heavily relied applies directly to insurers, not employers. Most importantly, the Court overlooked the fact that other priorities in Subsections 2 through 4 of N.R.S. 616C.530 can properly apply where it is not possible to give the employee the same job back.

In a related misapprehension of fact, the Court states at page 3 of its Opinion that two area sales manager positions were open for which Beckwith was qualified. In fact, the two positions were for *assistant* Sales Area Manager, which are trainee positions for which Beckwith was not eligible because Beckwith had already been trained to be an Area Store Manager. 2 Respondent's Appendix 250. The Court misapprehended that the same type of position was open at the time of her return to work as Beckwith had previously held when, in fact, no such position was open. Because Beckwith had been replaced, the first option under N.R.S. 616C.530 of giving her old job as Area Store Manager back to her was not possible nor was giving her a job as an Area Store Manager in another department for which she was eligible because none was available. 2 Respondent's Appendix 250.

Indeed, Beckwith did not claim that Area Store Manager positions were open; she concedes that the two open positions were for *assistant* Area Store Managers. See Beckwith's Answering Brief, page 11, lines 11 through 13. It was not possible for Dillards to follow Subsection 1 of N.R.S. 616C.530 by giving Beckwith her old job back

without removing her replacement who had been given the job of Area Store Manager during Beckwith's absence.

The Court's misapprehension of this fact is material because the unavailability of Beckwith's prior job under the statute upon which Beckwith relied requires analysis of the other priorities as well. The Court overlooked all other such priorities in its December 13, 1999 Opinion. Similarly, the Court overlooked the standards announced by this Court under *Mizushima* and *Stevens, supra,* concerning parties' entitlement to correct jury instructions concerning legal duty. Dillards was prejudiced by the incorrect jury instruction that it had an absolute obligation to return Beckwith to her prior job because it was no longer available. See Dillards Opening Brief, pages 12 through 14 and Dillards Reply Brief, pages 1 through 8 and pages 32 through 40.

The use of the priority of the return of an employee to work is not intended under the statute to apply in every instance. If it did, the other subsections of the statute, which the Court did not address, would serve no purpose. The Court overlooked the context of the statute in its discussion of Dillards' public policy argument.

The Court similarly overlooked the rest of the statutory scheme which provides for "benefit penalties" under N.R.S. 616A.070 and 616D.120 and the general policy of the workers compensation system which provides employees quick, effective relief from any alleged violations, thereby eliminating the need for such litigation as the instant case. Reply Brief pages: 36 (limitations on *Hanson* [sic] *v. Harris* [sic] by *Falline*), 37 (subsequent

legislative changes and provision for "benefit penalties"); 37 (additional penalties added by the legislature for any noncompliance, including complete decertification under the workers compensation insurance system); and 39 (consideration of the entire workers compensation statutory scheme with respect to claim violations of the public policy insofar as N.R.S. 616C.530(1) states the applicable public policy – as Beckwith argued and as the trial court instructed the jury). Dillards requests rehearing pursuant to N.R.A.P. 40 because the Court overlooked in its December 13, 1999 Opinion, the statutory context of the public policy at issue.

CONCLUSION

Dillards requests the Court to enter an order granting rehearing of this Appeal to consider: 1) Beckwith's admission that she was too busy working on the litigation full-time to be able to take a job and the authorities pertinent thereto on mitigation of damages cited by Dillards; 2) the effects of: *Falline* on emotional distress claims and punitive damages claims in the workers compensation setting; *Shoen's* disallowance of a tortious discharge claim where an alternative statutory remedy exists; and *Filice's* discharge of the employer-principal where the employee-agent is discharged; and 3) the context of the public policy at issue under N.R.S. 616C.530 and all its subparts in the overall workers compensation statutory scheme where the employee is replaced during her absence.

DATED this 3rd date of January, 2000.

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